

Preface

While serving as Governor of Virginia, Thomas Jefferson drafted the Bill for the General Diffusion of Knowledge, which stated, "...those persons whom nature hath endowed with genius and virtue should be rendered by liberal education worthy to receive, and able to guard the sacred deposit of the rights and liberties of their fellow citizens, and that they should be called to that charge without regard to wealth, birth, or other accidental condition or circumstance...." The U.S. Congress, following Thomas Jefferson's vision for a publicly-educated society, which was deemed necessary for a republican form of government, established the policy of granting land for the support of schools in new states with the General Land Ordinance of 1785. Land grants to states originally only included section 16 within each township, but were later expanded to sections 16 and 36 in 1848, and sections 2, 16, 32, and 36 in 1896. Additionally, some states were granted lands "in lieu of" sections 16 or 36 when those sections were already occupied or privately owned. The Enabling Act of 1889, under which Washington, North Dakota, South Dakota, and Montana were admitted to the Union, states, "That upon admission of each of said states into the Union, sections numbered sixteen and thirty-six in every township of said proposed states ...are hereby granted to said states for the *support of common schools...*"

When Montana became a state through the Enabling Act, the U.S. Congress granted to the State of Montana sections sixteen and thirty-six in every township within the state for common school support. Some of these sections had been homesteaded, some were within the boundaries of Indian reservations, and yet others were otherwise disposed of prior to the passage of the Enabling Act. To make up for the loss and in lieu thereof, other land was selected by the state. In addition to the common school grant, the Enabling Act and subsequent acts granted acreage for other education and state institutions. The Constitution of the State of Montana states in Article X that "All lands of the state ...granted by congress ...shall be *public lands of the state*. They shall be *held in trust for the people* ...for the respective purposes for which they have been or may be granted." Section 4 of Article 10 establishes the Board of Land Commissioners (Land Board) to oversee the management of Trust Land (MCA 77-1, Part 2). The Land Board consists of the statewide elected officials: Governor, Attorney General, Auditor, Secretary of State, and Superintendent of Public Instruction.

The original common school grant totaled 5,188,000 acres. The additional acreage provided for other endowed institutions included 668,720 acres, for a total of 5,856,720. These acreage figures have fluctuated throughout the years due to land sales and acquisitions. Surface acreage in Fiscal Year (FY) 2003 totals approximately 5.2 million acres. The Enabling Act provided that the proceeds from the sale and management of any Trust Land constitute permanent funds for the support and maintenance of the public schools and various state institutions. Rentals received on leased land, interest earned on the permanent fund, and all other income is distributed annually to the schools and institutions.

In the state of Montana, Trust Lands are managed by the Trust Land Management Division (TMLD) of the Montana Department of Natural Resources and Conservation. The mission

of the TMLD is to “manage the State of Montana’s Trust Land resources to produce revenues for the Trust beneficiaries while considering environmental factors and protecting the future income-generating capacity of the land.” Both the Enabling Act and Montana Constitution require compensation at “full market value” for disposition of Trust Lands. The Division manages these lands through a variety of mechanisms including leases for grazing, agriculture, mineral development, oil and gas development, timber harvest, and “other uses”. Other uses include lands used for residential, commercial, industrial, and conservation purposes. Approximately 90 percent of the Trust Land surface ownership is dedicated to the Common Schools (K-12), with the remaining 10% shared by nine other trust beneficiaries. Revenue generated from land management activities and interest earned from the Permanent Fund and distributed to the Common Schools totaled \$43.6 million, representing about 10 percent of the FY 2003 state-funded school budget.

Within the Trust Land Management Division, the Real Estate Management Bureau (REMB) is responsible for residential, commercial, industrial, and conservation uses on Trust Lands. The REMB is also responsible for the management of secondary uses (licenses) on agricultural, timber and grazing lands and for transactions involving land exchanges, land sales, and land acquisitions.

Applicable Regulatory Requirements

The REMB program is subject to a vast array of laws and rules at the federal, state, and local levels. The purpose of this section is not to be encyclopedic by describing all possible law scenarios but, instead, to highlight the major category of laws that would apply to real estate actions. In a general sense, the real estate management program would operate in the same legal context as the private sector with additional compliance to MEPA.

Federal Laws – Most of the applicable federal laws have state laws as counterparts, including laws related to air and water quality. Another category of federal law with some applicability to Trust Lands would be the Federal Endangered Species Act. The State Forest Management Plan (SFLMP 1996) has previously summarized these and other laws.

State laws – Title 75 of the Montana Code Annotated is a compilation of the laws that have applicability to environmental protection. Other land resource laws, including planning, zoning, and subdivision laws, are included in Title 76 of the Montana Code. Laws specific to state-owned lands are included in Title 77 of the Montana Code. Local governments, such as counties and cities, implement state laws through local ordinances and are the principal entities that regulate local land use proposals through regulations related to growth policies, zoning, subdivision review, and extension of utility services. Programmatic review under the Montana Environmental Policy Act is guided by 36.2.537, Administrative Rules of Montana.

- Trust Land Development Authority - As a statement of policy under Montana law: “It is in the best interest and to the great advantage of the state of Montana to seek the highest development of state-owned lands in order that they might be placed to their highest and best use and thereby derive greater revenue for the support of the common schools, the university

system, and other institutions benefiting therefrom, and that in so doing the economy of the local community as well as the state is benefited as a result of such development” (77-1-601,MCA).

- Montana Environmental Policy Act (MEPA) Analysis – In most situations, a MEPA analysis (75-1-101 et seq) is required whenever DNRC is proposing to issue a sale, exchange, right-of-way, easement, placement of improvement, lease, license, or permit or is acting in response to an application for authorization for such a proposal (77-1-121, MCA). As applicable to land use proposals, in particular, the MEPA analysis would begin following local review of the proposal and prior to final approval and authorization by DNRC. Local governments consider multiple environmental factors when developing land use regulations or reviewing land use proposals. Many of the public involvement and environmental review processes common to local government review are similar to those required under MEPA. Under all alternatives of this EIS, it is assumed that DNRC would follow local land use regulatory processes. By so doing, local governments become the initial decision-maker on most project proposals on Trust Lands. The local land use review processes would evaluate projects in relationship to uses, local policies, and environmental suitability. MEPA analysis would benefit from tiering to the local review process.

Local Land Use Policies and Regulations – Growth in the private sector is largely regulated by local land use regulatory processes that reflect local community values, design guidelines, and infrastructure capacities. Growth of commercial, industrial, and residential uses on Trust Lands would be subject to local review as applicable. Local government processes may include:

- Developing or amending growth plans;
- Participating in or initiating zoning and/or subdivision review;
- Pursuing annexation and development agreements; and,
- Participating in other processes where there is the possibility of increasing revenue for the trust beneficiaries.
- Projects proposed on state Trust Lands would be reviewed in accordance to all applicable regulatory processes. The appropriate MEPA analysis would follow the local land use approval process or prior to issuance by DNRC of any land use authority.

Administrative Framework

The management of Trust Lands for the benefit of Montana’s schools is the responsibility of the Montana Department of Natural Resources and Conservation under the general authority of the Board of Land Commissioners.

- The Board of Land Commissioners –The Board of Land Commissioners has general authority, direction, and control over the management, and disposition of state lands...(77-1-202,MCA). This includes the

authorization to lease Trust Lands for uses other than agriculture, grazing, timber harvest, or mineral production...or sell, exchange, or lease lands.... when, in the Board's judgment, it is advantageous to the state to do so in the highest orderly development and management of state Trust Land (77-1-204, MCA).

- DNRC – The management agency for Montana's Trust Lands is the Trust Land Management Division (TMLD or Division) of the DNRC. The TMLD was established in June 30th, 1995 through a legislative reorganization of Montana's natural resource agencies. The Division was further divided into four management bureaus – Agricultural and Grazing, Forest, Minerals, and Special Uses. The Special Uses Management Bureau, established in 1996, addressed those land uses on state Trust Lands classified as "other". In 2004, the Special Uses Management Bureau became the Real Estate Management Bureau (REMB). The role of the REMB within the Division is to seek revenue opportunities on lands that are principally valuable for uses other than grazing, crop production, timber production, or watershed protection. By authority of statute and rules, the TMLD generates revenue from commercial, conservation, industrial, and residential uses by land use authorizations using leases and licenses and through property transactions involving sales, exchanges, and easements. Commercial leasing of state land is specifically provided by 77-1-901 et seq, MCA. Other laws/rules establish specific processes for each of these land use authorizations, such as easements (77-2-101, MCA), exchanges (77-2-201, MCA), sales (77-2-301, MCA). The TMLD manages approximately 5.2 million acres of surface land in addition to more than 6 million acres of sub surface rights. Four bureaus coordinate activities to manage a portfolio consisting of income from (1) grazing, (2) agriculture, (3) minerals, and (4) real estate. The Real Estate Management Bureau would follow guidance offered by the plan selected through this EIS process. The Agriculture and Grazing Bureau and Minerals Bureau are guided by administrative rules. The Forest Management Bureau is guided by the rules adopted from the State Forest Land Management Plan (SFLMP). Other relevant documents to the real estate program include local government land use policies and regulations.
- Judicial Rulings – There are numerous judicial rulings that help to clarify the intent and purpose of Trust Lands. Notable cases include:
 - Toomey v. State Board of Land Com'rs (1938), 106 Mont. 547, 559, 81 P.2d 407, 414; State v. Stewart (1913), 48 Mont. 347, 349, 137 P. 854, 855. The Montana Supreme Court has declared that:

The state board of land commissioners, as the instrumentality created to administer that trust, is bound, upon principles that are elementary, to so administer it as to secure the largest measure of legitimate advantage to the

beneficiary of it." *Stewart*, 48 Mont. at 349-50, 137 P. at 855. The State Board of Land Commissioners (hereafter, the Board) "owe[s] a higher duty to the public than does an ordinary businessman.

- State v. Babcock (1966), 147 Mont. 46, 54, 409 P.2d 808, 812.
As a trust, the management of State trust lands is subject to several common law fiduciary trust duties. One fiduciary duty is to make trust property productive. See "Restatement of Law, Trusts 2nd" at §181 at p. 391: "A trustee of land is normally under a duty to lease it or to manage it so that it will produce income". This general trust duty is further reflected in the provisions of numerous state statutes applicable to the management of state trust lands. See, Sections 77-1-202; 77-1-204(2); 77-1-209; 77-1-216; 77-1-601; and 77-5-116, MCA. Consequently, it is improper to consider a program alternative that conflicts with the State's fundamental fiduciary duty to prudently produce a constant stream of revenue from trust assets.